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No. 588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

IN THE MATTER OF THE APPLICATION

of

PAUL SPIELVOGEL,

Petitioner-Appellant,

for an Order

vs.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, et al.,

Respondents-Appellees.

On Appeal From the Supreme Court of the State of New York, New York County, and the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

HERMAN J. ZAWIN,
18 Avenue B,
New York City, New York,
Attorney for Appellant.

I. STANLEY STEIN,
of Counsel.

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ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, and ART F. GREENE, JAMES D. LYNETT, JOHN D. O'CONNELL, HERBERT LIPPMAN, JEREMIAH P. SULLIVAN, H. W. WILDS and H. A. WEBSTER, Members of the License Board of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents-Appellees.

On Appeal From the Supreme Court of the State of New York, New York County, and the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

Paul Spielvogel submits herewith jurisdictional statement under Rule 15 of the Revised Rules of the Supreme Court of the United States, showing that this Court has

jurisdiction on appeal from the judgment entered in the Supreme Court of the State of New York, New York County, on August 1, 1956, pursuant to the Remittitur of the Court of Appeals of the State of New York, dated July 11, 1956, and that a substantial federal question is presented by the appeal.

The Court of Appeals is the state court of last resort. Its judgment in this case is final, both in form and sub stance, and disposes of all the elements in controversy in the court below.

Opinion Below

The opinion of the Court of Appeals of the State of New York is officially reported in 1 New York (2) 558-569. It is set forth in Appendix A.

The opinion of Special Term, Supreme Court, New York County, has not yet been officially reported. It is set forth in Appendix B.

The remittitur of the Court of Appeals and the judgment of the Supreme Court, New York County, are reproduced in the Appendix C and D.

The Statutory Provisions Believed to Sustain the Jurisdiction

This proceeding in the nature of mandamus was instituted in the Supreme Court of the State of New York, County of New York, to review and annul the suspension and revocation of a master electrican's license issued by Respondent, as commissioner; and held by petitioner-appellant for over 25 years. The respondent, Arthur C. Ford, Commissioner of Water Supply, Gas and Electricity of the City of New York, acted under authority conferred by Section B30-16.0 of the Administrative Code of the City of New York, enacted by the City Council of the City of New York. Petitioner-Appellant drew into question that

portion of Section B30-16.0 which empowered the aforesaid Commissioner to suspend and revoke his master electrician's license on the sole ground of "being principally engaged in other business • • •." The validity of that portion of the statute under which the Commissioner acted was challenged on the ground that it was repugnant to Amendment XIV, section 1 of the United States Constitution and violative of Article 1, Sections 6; 1, of the Constitution of the State of New York. The Court of Appeals of the State of New York necessarily considered this sole constitutional question, as if reflected in the decision of said court—*Spielvogel* v. *Ford*, 1 New York (2) 558, 562; and the decision in the highest court of the State of New York in this cause was in favor of the validity of the challenged portion of the statute.

It is believed that the Supreme Court of the United States has jurisdiction to review on a direct appeal the judgment in question by virtue of the express provisions of Title 28 USC 1257(2) which are in material part as follows:

> "(2) • • • where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, • • • of the United States, and the decision is in favor of its validity."

The Court of Appeals in sustaining the portion of the statute challenged, Section B30-16.0 of the Administrative Code, necessarily passed upon questions under the Federal Constitution, viz: whether B30-16.0 is repugnant to Amendment XIV, Section 1, and determined that question in the negative.

The State Statute, the Validity of Which is Involved

The statute, the validity of which is involved, is a portion of Section B30-16.0 of the Administrative Code of the City of New York, enacted by the City Council of the

City of New York as Local Law No. 43, Laws of 1943, which provides in full:

> "B30-16.0—Suspension or revocation of licenses. Every holder of a license, upon retiring from the electrical business or upon the occurrence of any other cause for the suspension or revocation of such license, shall notify the Commissioner in writing of such fact, at the same time enclosing the license certificate. The *commissioner may, by an order in writing, suspend or revoke any license issued by him after a hearing on notice before the license board*, and, upon good cause shown, *including among other things, being principally engaged in other business*, farming of licenses, failure to file applications for certificates of inspection, contract work by holders of special licenses, fraudulent dealing, misrepresentation or conviction of a crime by a competent court." (Italicized part is the only portion of the statute challenged as unconstitutional).

Section B30-16.0 constitutes a state statute within the meaning of Title 28 U.S.C. 1257 (2). *North American Storage Co.* v. *Chicago*, 211 U. S. 306, 313 (1908); *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 549, 555 (1914); *Lake Erie & Western Railroad* v. *State Public Utilities Commissioner of Illinois*, 249 U. S. 422, 424 (1919); *King Manufacturing Company* v. *City Council of Augusta*, 277 U. S. 100, 102 (1928); *Sultan Ry. Co.* v. *Dept. of Labor*, 277 U. S. 135, 136 (1928); *Hamilton* v. *Regents of the Univ. of California*, 293 U. S. 245, 258 (1934); *Railway Express Agency et al.* v. *New York*, 336 U. S. 106 (1949).

Petitioner claimed that the challenged portion of the aforesaid statute was repugnant to Amendment XIV, Section 1 of the Constitution of the United States, that provides

> "* * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

This challenge was raised in every step in this proceeding, to wit:

(a) the petition in the Supreme Court of the State of New York, County of New York, at the institution of said proceeding;

(b) in the reply to the answer of the respondents;

(c) in the notice of appeal to the Court of Appeals, State of New York;

(d) in the request to the Court of Appeals to dispense with a bond by virtue of appealing solely on a constitutional question being involved; and

(e) in the brief and argument to the Court of Appeals.

Special Term, Supreme Court of the State of New York, County of New York, necessarily considered the challenge to the aforesaid statute on the constitutional ground as is reflected in Appendix B. Likewise, the Court of Appeals necessarily considered the constitutional question involved arising under Amendment XIV Section 1 of the federal constitution as is reflected in the opinion of the Court of Appeals, Appendix A. The fact is that this proceeding went directly to the Court of Appeals from the lower court on the sole ground that it involved a constitutional question and no other questions were raised as to any other point. This is reflected from the order in Appendix E.

The judgment entered in Supreme Court, New York County, on August 1, 1956, was entered therein as a judgment of the Court of Appeals of the State of New York in accordance with the provisions of the Remittitur of the Court of Appeals, dated July 11, 1956.

As appears on page B4 of the record, embodying the notice of appeal to the Supreme Court of the United States, said notice was duly and timely personally served

pursuant to Rule 33, Rules of Supreme Court United States; upon the attorney of record for the respondent, as is evidenced by the endorsement of the official stamp of the Corporation Counsel of the City of New York, attorney of record, dated October 9, 1956. Said notice was within 90 days from July 11, 1956, the date of the Remittitur. The notice of appeal was filed on October 9, 1956, in the office of the County Clerk of the County of New York wherein the judgment, *supra*, was filed. Certification of all papers herein noted was made by the County Clerk as appears in the record submitted simultaneously herein.

Questions Presented

1. The question of most serious public concern presented by this appeal was acknowledged in the dissenting opinion wherein it was noted that many people are compelled to engage in two occupations to earn a living, and the dissenting opinion stated: "If the order appealed from be upheld, all of such persons may be in jeopardy." The decision sought to be reviewed, in effect, deprives a person, concededly qualified by training, experience, and by examination, the right to pursue his vocation, on the sole ground that he is not exclusively engaged in the business of a master electrician.

2. Whether the court below erred in holding that the City of New York may limit one in his choice of a trade, as is accomplished by Section B30-16.0, when said restriction bears no relation to the public safety.

3. Whether that portion of Section B30-16.0 challenged as unconstitutional, is repugnant to Amendment XIV, section 1 of the United States Constitution?

The constitutionality of the portion of the Statute herein challenged as a license regulation, or of any similar pur-

ported regulation of occupations, has never been passed upon by the Supreme Court of the United States.

That the questions here presented are substantial is indicated by the compelling, persuasive dissenting opinion in the Court of Appeals.

These questions are of vital importance not only to appellant, who is particularly interested in the outcome of this appeal, but as the dissenting opinion indicates to many others; "* * * as though a lawyer were to be disbarred upon the ground that he is also an officer of a corporation to whose business he devotes more than fifty per cent of his business day."

That the foregoing questions presented on this appeal are substantial is further evidenced by the basic underlying propositions developed in the Statement of the Case.

Statement of the Case

Petitioner, 50 years of age, a wounded veteran of World War II, for the major portion of his life followed two occupations for a livelihood—that of master electrician and motion picture operator. Since the year 1926 he held a motion picture operator's license, and, since the year 1928, he held a master electrician license. Both licenses were renewed annually by him. Both licenses were issued and are subject to the jurisdiction of the Commissioner of Water Supply, Gas and Electricity of the City of New York, respondent at bar. The record is undisputed that for almost three decades the petitioner has proven his competence, and there is not a blemish on his record. His master electrician license was suspended and revoked on the sole ground that:

> "After due hearing, you were found guilty of being principally engaged in other business, namely, em-

> ployed as a motion picture operator by the Trans-Lux Theatre located at Madison Avenue and 85th Street, New York City."

As stated in the dissenting opinion; "This fatal offense was created by Section B30-16.0 of the Administrative Code, directing the suspension of such licenses "upon good cause shown, including, among other things, being principally engaged in other business * * *."

Said portion of Section B30-16.0 was challenged as it is not reasonably calculated to achieve a legitimate public purpose, and although purporting to have been enacted to protect the public safety, it has no real or substantial relation to that object, but, as the dissenting opinion stated "* * * this statute bears the earmarks of having been promoted by business competitors in an endeavor to limit competition." The dissenting opinion continued:

> "The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. Its determination of what is a proper exercise of the police power is not final or conclusive, unless the enactment bears some relation to a purpose for which the police power is authorized (Lawton v. Steele, 152, U. S. 133, 137). No such relationship exists here."

The Questions Are Substantial

Petitioner contended in the court below, and does in this Court too, that the challenged portion of the Statue, *supra*, is violative of amendment XIV, section 1 of the federal Constitution. In the case of *Louis K. Liggett Company* v. *Baldridge*, Attorney General of Pennsylvania, *et al.*, 278 U. S. 101, 113 (1928) the court held:

> "A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or

prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' Burns Baking Co. v. Bryan, 264 U. S. 504, 513. See also Meyer v. Nebraska, 262 U. S. 390, 399-340; Norfolk Ry. v. Public Service Comm'n, 265 U. S. 70, 74; Pierce v. Society of Sisters, 268 U. S. 510, 534-535; Weaver v. Palmer Bros. Co., 270 U. S. 402, 412-415; Fairmont Co. v. Minnesota, 274 U. S. 1, 9-11."

To the same general effect are many cases: *Mugler* v. *Kansas,* 123 U. S. 623, 661 (1887); *Smith* v. *Texas,* 233 U. S. 630; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589-591 (1897); *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 278 (1932).

The importance of the question is too evident to warrant any lengthy discussion that the right to earn a livelihood is a fundamental right under the protection of the federal constitution.

Wherefore, it is respectfully submitted, that the questions presented by this appeal are substantial and of public importance, and the appeal in the above entitled cause comes within the jurisdiction of this Court.

Respectfully submitted,

HERMAN J. ZAWIN,
Attorney for Petitioner-Appellant,
18 Avenue B,
New York City.

I. STANLEY STEIN,
Of Counsel.

November 16, 1956.

APPENDIX A

Opinion of the Court of Appeals of the State of New York

OFFICIALLY REPORTED (1 N. Y. (2) 558)

CONWAY, Chief Judge.

This appeal is taken directly to this court from the Supreme Court order pursuant to the provisions of the Civil Practice Act, § 588, subd. 4, upon the ground that the sole question involved is the constitutionality of section B30—16.0 of the Administrative Code of the City of New York, which provides: "B30—16.0 Suspension or revocation of licenses. Every holder of a license, upon retiring from the electrical business or upon the occurrence of any other cause for the suspension or revocation of such license, shall notify the commissioner in writing of such fact, at the same time enclosing the license certificate. *The commissioner may, by an order in writing, suspend or revoke any license issued by him after a hearing on notice before the license board and, upon good cause shown, including, among other things, being principally engaged in other business,* farming of licenses, failure to file application for certificates of inspection, contract work by holders of special licenses, fraudulent dealing, misrepresentation or conviction of crime by a competent court." (Emphasis supplied.)

In 1926, petitioner was licensed as a *motion picture operator* by respondent commissioner and has had that license continuously from that time until the present, with the exception of the years 1943 and 1944. In 1928, petitioner was licensed as a master electrician by respondent commissioner and has had that license continuously from 1928 to June 17, 1955, with the exception of the years 1943 and 1944. Petitioner admits that, prior to June 17, 1955 (the date of the order of the Commissioner of the Department of Water Supply, Gas and Electricity here

sought to be reviewed), he had been employed for three nights a week as a motion picture operator at the Trans-Lux Theatre from the hours of 6:00 P.M. to 12:00 P.M. He claims, however, that he was engaged as a master electrician during the hours when he was not engaged as a projectionist.

At the hearing held on June 7, 1955, petitioner, in response to a question as to what business he was in, replied: "I am a projectionist". An inspector's report discloses that the inspector spoke "to Mrs. Spielvogel and she told me that he works steady as a motion picture operator." Petitioner further testified at the hearing that he had his name on the window of a hardware store and that the owner of the store takes orders for his services as an electrician and he gets them from the store owner.

The board offered to allow petitioner to put his license in escrow until such time as he left the motion picture industry, but petitioner declined.

The following motion was made and duly seconded before the board: "Resolve, it be recommended to the Commissioner that his [petitioner's] Master Electrician's License No. 6280 be suspended until such time as he appears before the Board and demonstrates to them that he is not principally engaged in other business, provided, however, that such appearance is made on or before December 31st, 1955, as after such date no opportunity to be heard will be granted him and the renewal of the license will be denied, as he has been found guilty of the charge of being principally engaged in other business." On or before the 17th of June, 1955, the respondent commissioner notified petitioner in writing of the above resolution of the board.

Subsequently, petitioner brought this article 78 proceeding to (1) annul the determination of respondents suspending petitioner's master electrician's license, and

to (2) direct the respondent commissioner to issue the license to petitioner. Only one contention was made at Special Term, the same contention presently here, viz., that that portion of the Administrative Code of the City of New York which enables the commissioner to suspend or revoke a license, after a hearing on notice before the board, on the ground of "being principally engaged in * * * business" other than that of a master electrician, is violative of article I, §§ 6, 1, of the Constiution of the State of New York and also the Fourteenth Amendment, § 1, of the Constitution of the United States.

No issue is raised concerning the power of respondents to regulate all persons engaged in the electrical field, and petitioner concedes that respondents have that power.

As the majority of the court said in Defiance Milk Products Co. v. Du Mond, 309 N. Y. 537, 540-541, 132 N. E. 2d 829, 830, in reference to the constitutionality of statutes: "The applicable rules of law are well known. Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209, 210, 55 S.Ct. 187, 79 L.Ed. 281. If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234. Questions as to wisdom, need or appropriateness are for the Legislature. Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 246, 61 S.Ct. 862, 85 L.Ed. 1305. Courts strike down statutes only as a last resort, Ahern v. South Buffalo Ry. Co., 303 N.Y. 545, 555, 104 N.E.2d 989, 903, affirmed 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395, and only when unconstitutionality is shown beyond a reasonable doubt. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79, 31 S.Ct. 337, 55 L.Ed. 369; Matter of Fay, 291 N.Y. 198, 206, 207,

52 N.E.2d 97, 98. But, for all that, due process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil. Matter of Jacobs, 98 N.Y. 98, 110; Fisher Co. v. Woods, 187 N.Y. 90, 79 N.E. 836, 12 L.R.A.,N.S., 707; Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940. And even though a police power enactment may have been or may have seemed to be valid when made, later events or later-discovered facts may show it to be arbitrary and confiscatory. Abie State Bank v. Bryan [Weaver], 282 U.S. 765, 772, 51 S.Ct. 252, 75 L.Ed. 690."

Thus, the sole questions presented for our determination are whether (1) the City Council of the City of New York had a reasonable basis upon which to act, (2) whether the enactment was reasonable when made and reasonably related to some actual manifest evil, and (3) if so, whether subsequent events have shown the enactment to be arbitrary and confiscatory.

It is clear that the City Counsel had a reasonable basis upon which to act in view of the inherently dangerous nature of electricity and, in fact, petitioner by conceding that power of regulation concedes that a reasonable basis exists for the legislative body to act.

The manifest evil to which the legislation was addressed was the damage and injuries which can be caused by electricity when not properly handled. The exact nature or composition of electricity is unknown, even to this day, and all that our men of science have been able to do is to chart a behavior pattern of this unknown quantity which enables us to harness and control it. The legislative intent behind the enactment of the legislation is set forth in the Administrative Code itself, where the purpose is stated as follows: "B30—2.0 Purpose. Since there is danger to life and property inherent in the use of electrical energy, the electrical code is enacted to regu-

late the business of installing, altering or repairing wiring and appliances for electric light, heat or power in or on all real property within the building lines in the city of New York and the licensing of all persons who engage in such business." With this thought in mind the Legislature defined a master electrician as follows: "Master electrician. Any person, partnership or corporation who engages in or carries on as his or its regular business the business of installing, erecting, altering, extending, maintaining or repairing electrical wiring * * * and who carries on such business as an independent contractor having the final determination and the *full responsibility* for the manner in which the work is done, for the materials used and for the selection, supervision and control of any persons employed on the work engaged in by said person, partnership or corporation." Administrative Code of City of New York, § B30—4.0, subd. 54; emphasis supplied. Therefore, it appears that the master electrician, is the person who has *"the full responsibility"* for everything that is done. He has the full responsibility for the final determination in the manner in which the work is done and the materials which are used. He has the full responsibility for the selection, supervision and control of all persons employed by said partnership, person or corporation. In other words, the master electrician is the person upon whom culpability is placed in the event that anything is improperly done, and it is he to whom the City of New York looks for full responsibility. In addition, the City Council and the Department of Water Supply, Gas and Electricity has provided that any firm, partnership or corporation shall not have more than one master electrician in its employ. Administrative Code of City of New York, § B30—4.0, subd. 55; Rules & Regulations Relating to Conduct of Licensed Electricians, No. 4. The Administrative Code provides that a member of the partnership shall hold the

master electrician's license as a representative under the name of the partnership, and that an officer of the corporation shall have the license issued to him as the representative of the corporation. It is further provided in the rules that, if a person holding a master electrician's license shall become employed by a firm, partnership or corporation, he must surrender his license when he becomes so employed. Therefore, the effect is that in any business entity doing electrical contracting work, there is only one master electrician, and it is upon this single individual that the full responsibility falls for all the work done by this business entity, whether it be a small firm or a gigantic corporation. In this manner the Licensing Board of the Department of Water Supply, Gas and Electricity has full and complete control of a corporation or a partnership, as well as an individual firm, regardless of its size, for since there is only one person who represents any of them as a master electrician, the taking away of that person's license immobilizes, at least temporarily, the entire entity. The result is that there would be a natural tendency towards rigid adherence to all the rules or regulations set forth in the Administrative Code itself and those promulgated by the Department of Water Supply, Gas and Electricity. There would be very little tendency on anyone's part to deviate in the slightest, either in an effort to save time or money, because, if such violation became known, then the firm, partnership or corporation concerned would be in the position of finding that it could no longer operate at all, since the board could revoke the master electrician license of the representative, causing all business activity on the part of the entity concerned to come to an end. In this way the City Council has found a method of best protecting the residents from injury or damage from irresponsible electrical work by the means of forcing responsibility upon those who operate in this area of endeavor.

Appendix A

As we pointed out in People ex rel. Stepski v. Harford, 286 N. Y. 477, 484-485, 36 N.E.2d 670, 673: "It is not unreasonable for municipal authorities to insist that the *responsibility* for altering, repairing or making connections to any part of the plumbing system in their cities shall be upon men of good repute, character and *responsibility* who have a place of business in the affected city, who have passed an examination as to their competency in their trade and who may be personally found promptly and held to that *responsibility*, by the municipality or its residents, for acts of commission or omission by themselves or those whom they have employed. We know of no trade, business or calling in the community which more vitally affects the public health and safety of city dwellers than that of plumbing." (Emphasis supplied.) That has equal applicability to the case before us.

With this in mind, it is manifest that there is a reasonable basis for requiring that master electricians be not principally occupied in any other business. If a person who is a master electrician is not principally engaged in the electrical business but is principally engaged in and relies on some other endeavor, the degree of responsibility which is forced upon him to adhere to the legislative enactments and the board's regulations and to prevent him from "cutting corners" in order to save time or money is greatly reduced for the power which the board has over him, viz., that of revoking or suspending his license, is not as certain a method of control as it is over those who are principally engaged in the business. The City Council, realizing that, when an electrical accident occurs, it is invariably either fatal to a person involved or causes great damage, has acted with the necessary thoroughness to enforce responsibility with reference to its enactments or the rules of the board, and in so doing has reasonably decided that a person engaged in such business must be principally engaged in it. Those princi-

pally engaged in the business must protect their business interest by protecting their master electrician's license, or their business will no longer exist. Those not principally engaged in the electrical business and who have a master electrician's license, need not fear as much as the others the revocation of that license *since they are not principally engaged in that business* and the result is that the residents are not afforded the degree of protection to which they are entitled, particularly in view of the deadly nature of electrical current. Clearly, this in and of itself, is a reasonable basis for the legislation of which complaint is made.

The petitioner makes several extraneous arguments to support his contention that the enactment attacked is unconstitutional. Thus, he contends that he lost his license merely because he did not earn sufficient money in the electrical business. That question is not before us—the only question we are presented with is the reasonableness of the enactment and we are not to inquire into the quantum of work performed or money earned as a master electrician or as a motion picture projectionist. That would only relate to the issue of whether petitioner was principally engaged, and whether the board had sufficient evidence to support its findings that he was principally engaged in other business. Petitioner only questioned the constitutionality of the enactment and, by doing so, in effect, conceded that the board was correct in its determination that he was principally engaged as a projectionist, and, in fact, if the petitioner were now to be heard urging that the board did not have sufficient evidence to support its determination, this appeal would have to be dismissed, for an appeal as of right from the Special Term lies only when the sole issue involved is the constitutionality of a statutory provision.

Similarly petitioner's attempt to discredit the statement of the commissioner to the effect that: "Records

of the Fire Department indicate that many persons have been electrocuted together with the loss of property due to improper installations or repairs of electrical wiring as a result of improper supervision, or lack of supervision", by stating that petitioner has an unblemished record, will not withstand analysis. Such argument does not go to the reasonableness of the legislative enactment. The reasonableness of the enactment as such, is clearly not dependent upon whether or not the petitioner is qualified.

It must be noted that Special Term pointed out that: "The statute here involved merely forbids petitioner from being an employing (Master) electrician upon whom falls more than perfunctory responsibilities, such as selecting employees, selecting proper materials and supervising all electrical installations and repairs." Therefore, the most this enactment can be said to accomplish is that of preventing the petitioner from being an employer, for it certainly does not prevent him from being a journeyman electrician in the employ of someone else.

The keynote of the electrical code is *supervision* and *responsibility*. The *supervision* flows from the New York City authorities over the persons engaged in the electrical contract work, and the *responsibility* is the responsibility of the persons engaged in that business in observing the regulations pertaining to it. The lever which the city uses is the master electrician's license, for this is the license which a firm, partnership or corporation is required to have in order to participate in that business, and it is the single licensees of those business entities that the city holds responsible for all acts carried on by those businesses. It is in this manner that the City Council of the City of New York has seen fit to best protect its inhabitants from the fatal dangers which attend faulty and irresponsible electrical installations, and such cannot be said to be unreasonable.

The order should be affirmed, with costs.

Appendix A

Dissenting Opinion

VAN VOORHIS, Judge (dissenting).

Since 1926 appellant has held a license from the City of New York as a motion picture operator; and since 1928 he has been a duly licensed master electrician. Both licenses have been annually renewed. On June 17, 1955 his license as master electrician was suspended upon the ground that the licensing board found him "guilty of being principally engaged in other business, namely, employed as a motion picture operator by the Trans-Lux Theatre". This fatal offense was created by section B30—16.0 of the Administrative Code, directing the suspension of such licenses "upon good cause shown, including, among other things, being principally engaged in other business." Other causes enumerated for mandatory suspension are various forms of deceit and conviction of crime.

No question is involved of appellant's competence to engage in this occupation. He has been forbidden to operate as a master electrician for the reason that a majority of his time is devoted to being a motion picture operator, as though a lawyer were to be disbarred upon the ground that he is also an officer of a corporation to whose business he devotes more than 50% of his business day. In Hauser v. North British & Mercantile Ins. Co., 206 N.Y. 455, 461-462, 100 N.E. 52, 53, 42 L.R.A.,N.S., 1139, section 142 of the Insurance Law, as enacted by chapter 748 of the Laws of 1911, was held to be unconstiutional for the reason that it attempted to confine the business of broker in procuring insurance to those who should make that their principal business, or who were real estate agents or brokers. This court said: "There is no good reason, and no public interest can, conceivably, be subserved, in prohibiting persons from conducting the business of an insurance agent, or broker, in connection with any other lawful business, or occupation, in which they may be en-

gaged." Furthermore, the court took occasion to observe that the legislation in question "must have been promoted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare."

In Richardson v. Coker, 188 Ga. 170, 174, 175, 3 S.E.2d 636, 639, a statute imposing a condition upon licenses for electrical contractors was held to be unconstitutional, that an applicant must submit to the judgment of a board his ability " 'for the purpose of determining whether he may be reasonably expected to satisfactorily complete any contracts he may enter into with citizens of Atlanta.' " Unless an occupation affords some greater or more peculiar opportunity for fraud than do most of the other common occupations, it was held that the police power could not be invoked successfully to support that regulation. Competency and skill in the trade was another matter. Those qualifications are not challenged in the case now before this court.

Laws which limit one in his choice of a trade or profession "are infringements upon his fundamental rights of liberty, which are under constitutional protection." Schnaier v. Navarre Hotel & Importation Co., 182 N.Y. 83, 88, 74 N.E. 561, 562, 70 L.R.A. 722. There is probably no single procedure whereby the liberties of the citizen are being more undermined in this country today than by the multiplication of licensing statutes, subjecting the right to engage in a trade or profession to the discretion of some public official. It is more than ever necessary for courts to be on guard to invalidate licensing statutes unless they are actually related to the public safety, health, morals or general welfare. Electrical contracting manifestly is related to the public safety, nor would anyone question that the right to engage in that occupation can be conditioned upon demonstration of ex-

perience and ability to perform that kind of work. It bears no relation to the public safety, however, whether appellant, for example, consumes 40% of his time as master electrician and is otherwise idle, in which event he could be licensed under this section of the Administrative Code, or whether he devotes the remaining 60% of his time to some other useful pursuit, which would result in the loss of his license. It would be reasonable to insist that he do enough work as master electrician to insure continued competence in that job, but that question is not at issue here.

Appellant's record as master electrician is unblemished since a license was first issued to him in 1928. He testified that in his situation he needs to engage in both of these occupations in order to earn a living. The same is true of many other people in other occupations that are subject to licensing, both in public and private positions. If the order appealed from be upheld, all of such persons may be in jeopardy.

Like some other licensing statutes, cf. Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829; People v. Ringe, 197 N.Y. 143, 90 N.E. 451, 27 L.R.A.,N.S., 528; People v. Gillson, 109 N.Y. 389, 17 N.E. 343; Hauser v. North British & Mercantile Ins. Co., supra; Richardson v. Coker, supra, this statute bears the earmarks of having been promoted by business competitors in an endeavor to limit competition.

The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. Its determination of what is a proper exercise of the police power is not final or conclusive, unless the enactment bears some relation to a purpose for which the police power is authorized. Lawton v. Steele, 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385. No such relationship exists here.

The order appealed from should be reversed, with costs in all courts, and the respondent commissioner should be directed to reinstate petitioner as a licensed master electrician.

DESMOND, DYE, FULD and FROESSEL, JJ., concur with CONWAY, C. J.

VAN VOORHIS, J., dissents in an opinion.

BURKE, J., taking no part.

Order affirmed.

APPENDIX B

Opinion of Special Term, Supreme Court, New York County.

Motion for an order setting aside and declaring null and void the decision of respondents, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York and the members of the license board, suspending petitioner's Master Electrican's license after a hearing is denied.

The sole question involved is the constitutionality of section B30-16.0 of the Administrative Code of the City of New York as re-enacted by local legislature in December, 1943. Since 1928 petitioner has been licensed to engage in the business of a Master Electrician. He has also been licensed as a motion picture operator since 1926.

The petitioner is regularly employed as a motion picture projectionist and admits that he is principally engaged in a business other than electrical contracting (Ex. "A", p. 5). At the beginning of the hearing convened for the determination of petitioner's right to hold a Master Electrician's license, he stated in answer to the first question propounded as to his business (Ex. "A", p. 1): "Q. What business are you in? A. I am a projectionist. Q. Motion picture projectionist? A. Yes."

This record further indicates that petitioner's activities in the electrical contracting business have been sparse and irregular. It seems clear that a revocation of petitioner's Master's license does not disqualify him from engaging in ordinary electrical work, and it is likewise apparent that a Master's license carries with it and demands far more important functions than the elementary and casual jobs of an ordinary electrician (sec. B30-410, subdiv. 54, Administrative Code). Section B-30-16.0 specifically provides that a Master's license may be suspended and revoked when he is principally engaged in other business.

Appendix B

An analysis of the various sections relating to the electrical code indicates that they were enacted for the purpose of the public safety and welfare.

The statute here involved merely forbids petitioner from being an employing (Master) electrician upon whom falls more than perfunctory responsibilities, such as selecting employees, selecting proper materials and supervising all electrical installations and repairs.

The elements essential to the relief sought by the petitioner have not been established.

Dated, Jan. 20, 1956.

O. McG.
J. S. C.

APPENDIX C

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of July in the year of our Lord one thousand nine hundred and fifty-six, before the Judges of said Court.

Witness:

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur July 11, 1956.

Appendix C

No. 139.

In the Matter of the

Application of PAUL SPIELVOGEL,

Appellant,

for an order

vs.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 20th day of April in the year of our Lord one thousand nine hundred and fifty-six, Paul Spielvogel, the appellant—in this cause, came here unto the Court of Appeals, by Herman J. Zawin, his attorney—and filed in the said Court a Notice of Appeal and return thereto from the order of the Supreme Court, New York County. And Arthur C. Ford, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown, their attorney.

WHICH said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. I. Stanley Stein, of counsel for the appellant—and by Mr. Anthony Curreri, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order appealed from herein be and the same hereby is affirmed, with costs.

AND it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

AND hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON (signed)
Clerk of the Court of Appeals of the
State of New York

COURT OF APPEALS, CLERK'S OFFICE.
Albany, July 11, 1956

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON (signed)
Clerk.

APPENDIX D

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse in said County on the 1st day of August, 1956.

Present:

HON. HAROLD A. STEVENS,
Justice.

In the Matter of the Application

of

PAUL SPIELVOGEL,
Petitioner-Appellant,

for an Order

against

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas, and Electricity of The City of New York, and BART F. GREENE, JAMES D. LYNETT, JOHN D. O'CONNELL, HERBERT LIPPMAN, JEREMIAH P. SULLIVAN, H. W. WILDS and H. A. WEBSTER, Members of the License Board of the Department of Water Supply, Gas, and Electricity of The City of New York,

Respondents-Respondents.

The petitioner-appellant having appealed to the Court of Appeals from an order of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on or about the 20th day of January, 1956; and the appeal having been duly argued in the

Court of Appeals, and that Court in an order dated the 11th day of July, 1958 having ordered and adjudged that the order so appealed from be affirmed with costs, and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court and to be proceeded upon according to law,

Now, upon reading and filing the remittitur from the Court of Appeals and on motion of Peter Campbell Brown, Corporation Counsel, attorney for respondents, it is

ORDERED that the order of the Court of Appeals be and the same hereby is made the order of this Court, and it is further

ORDERED that the respondents, Arthur C. Ford, Commissioner of the Department of Water Supply, Gas, and Electricity of The City of New York, and Bart F. Greene, James D. Lynett, John D. O'Connell, Herbert Lippman, Jeremiah P. Sullivan, H. W. Wilds and H. A. Webster, Members of the License Board of the Department of Water Supply, Gas, and Electricity of The City of New York (Municipal Building, Borough of Manhattan, City of New York), recover of the petitioner-appellant, Paul Spielvogel (104-32 Merrick Boulevard, Jamaica 5, N. Y.), the sum of $151.70 costs as taxed, and that said respondents have execution therefore, and it is further

ORDERED that the Clerk of the County of New York, be and hereby is directed to docket this order as a judgment.

Enter,

H. A. S.,
J. S. C.

ARCHIBALD R. WATSON,
Clerk.

APPENDIX E

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fifteenth day of March A. D. 1956.

Present:

HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 124.

IN THE MATTER

of

The Application of PAUL SPIELVOGEL,

Appellant,

for an order

vs.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, & ors., &c.,

Respondents.

A motion having heretofore been made upon the part of the appellant for a certificate that a constitutional question is involved on the appeal herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

GEARON KIMBALL,
Deputy Clerk.

(SEAL)

(35088)

FILED
DEC 14 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 588

In the Matter of the Application

of

PAUL SPIELVOGEL,
Petitioner-Appellant,

for an order

vs.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, *et al.*,
Respondents-Appellees.

On Appeal from the Supreme Court of the State of New York, New York County, and the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

PETER CAMPBELL BROWN
Corporation Counsel of the City of New York
Attorney for Appellees
Municipal Building
New York 7, New York

SEYMOUR B. QUEL
ANTHONY CURRERI
of Counsel

307 BAR PRESS, INC., 84 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 9-5432

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IN THE

Supreme Court of the United States

October Term, 1956

No. 588

In the Matter of the Application
of
PAUL SPIELVOGEL,
Petitioner-Appellant,

for an order

vs.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, and BART F. GREENE, JAMES D. LYNETT, JOHN D. O'CONNELL, HERBERT LIPPMAN, JEREMIAH P. SULLIVAN, H. W. WILDS and H. A. WEBSTER, Members of the License Board of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents-Appellees.

On Appeal from the Supreme Court of the State of New York, New York County, and the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

Preliminary Statement

The petitioner has appealed from a judgment entered in the Supreme Court of the State of New York, New York County, on August 1, 1956, pursuant to the remittitur of the Court of Appeals of the State of New York dated July 11, 1956.

The opinion of the Special Term of the Supreme Court, New York County, not officially reported, is set forth in Appendix B to the appellant's Jurisdictional Statement. The opinion of the Court of Appeals of the State of New York is officially reported in 1 N. Y. 2d 558, and is set forth in Appendix B to the appellant's Jurisdictional Statement.

By this appeal, the appellant seeks to challenge the constitutional validity of that portion of Section B30-16.0 of the Administrative Code of the City of New York which empowered the appellee, Arthur C. Ford, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, to suspend and revoke the appellant's license as a master electrician on the ground that he was "principally engaged in other business," claiming that the provision under attack is repugnant to that part of Amendment XIV, section 1, of the Constitution of the United States which forbids a State to "deprive any person of life, liberty, or property without due process of law."

The appellees move to dismiss the appeal on the ground that it does not present a substantial Federal question.

Statutes Involved

Section B30-16.0 of the Administrative Code of the City of New York, a portion of which is here challenged as unconstitutional, is part of what is known as the Electrical Code of the City of New York, enacted by the City Council of the City of New York as Local Law No. 43, Laws of 1943. This code may be found in convenient form in the 1952 Cumulative Supplement to the Williams Press edition of the New York City Charter and Administrative Code, at pp. 537-772.

We set forth in full the provisions of Section B30-16.0 of the Administrative Code of the City of New York, italicizing that provision which the appellant attacks as constitutionally invalid:

> **"§B30-16.0 Suspension or revocation of licenses.** Every holder of a license, upon retiring from the electrical business or upon the occurrence of any other cause for the suspension or revocation of such license, shall notify the commissioner in writing of such fact, at the same time enclosing the license certificate. *The commissioner may, by an order in writing, suspend or revoke any license issued by him after a hearing on notice before the license board and, upon good cause shown, including among other things, being principally engaged in other business,* farming of licenses, failure to file applications for certificates of inspection, contract work by holders of special licenses, fraudulent dealing, misrepresentation or conviction of crime by a competent court."

Other sections of the Administrative Code pertinent to this appeal are:

"§B30-2.0 **Purpose.** Since there is danger to life and property inherent in the use of electrical energy, the electrical code is enacted to regulate the business of installing, altering or repairing wiring and appliances for electric light, heat or power in or on all real property within the building lines in the city of New York and the licensing of all persons who engage in such business."

"§B30-3.0 **Construction.** This title shall be liberally construed to accomplish its purpose. Words used herein which have acquired a particular meaning in the usage of the electrical trades shall be construed as understood in the trade.

"§B30-4.0 **Definitions.** Unless otherwise expressly stated, the following terms, whenever used in this title, shall respectively be deemed to mean and include:

* * *

"4. Applicant. A person seeking to become an electrician or a person, partnership or corporation seeking a license or both, as the context may require.

* * *

"48. License. The written authorization of the commissioner to an individual, partnership or corporation to engage in the business of installing, altering or repairing electric wiring or appliances for light, heat or power in or on any building or premises, or lot in the city.

* * *

"54. Master electrician. Any person, partnership or corporation who engages in or carries on as his or its regular business the business of installing, erecting, altering, extending, maintaining or repairing electrical wiring, apparatus, fixtures, devices, appliances or equipment utilized or designed for the utilization of electricity for light, heat or power purposes or for signalling systems operating on fifty volts or more, exclusive of interior fire alarm systems and their attachments under the jurisdiction of the fire depart-

ment and the board of standards and appeals, and who carries on such business as an independent contractor having the final determination and the full responsibility for the manner in which the work is done, for the materials used and for the selection, supervision and control of any persons employed on the work engaged in by said person, partnership or corporation.

"55. Master electrician's license. A master electrician's license shall be a license issued to a master electrician as herein defined, who, by passing the required examination and tests, has qualified as a competent person to be a master electrician.

In the case of a partnership, the required examination and tests shall be taken and passed by at least one partner and the master electrician's license issued to him as a representative under the license of the partnership.

In the case of a corporation, the required examination and tests shall be taken and passed by an officer of the corporation and the master electrician's license issued to him as a representative under the license to the corporation."

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to review and annul the determination annulling and revoking the petitioner's license as a master electrician. The petitioner has been licensed as a motion picture operator by appellee Commissioner since 1926 and as a master electrician since 1928 except, in both cases, for the years 1943 and 1944 (1 N. Y. 2d at p. 561). At a hearing held June 7, 1955, at which the appellant was requested to answer the complaint that he was principally engaged in other

business, *i.e.*, that of motion picture operator, the appellant was found to be principally engaged in such other business (*ibid.*). The board before which the hearing was held recommended to the appellee Commissioner that the appellant's master electrician's license be suspended until the appellant proved he was no longer principally engaged in other business and, if such proof was not forthcoming by December 31, 1955, that the renewal of his license be then denied (*ibid.*).

ARGUMENT

This appeal presents no substantial federal question because it is clear that a rational basis exists for the police regulation under attack. This Court has declared that it will not sit as a super-legislature to weigh the wisdom of legislation, so long as it is not unreasonable or arbitrary and is reasonably related and applied to some actual and manifest evil. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952); *Carolene Products Co.* v. *United States*, 323 U. S. 18, 31-32 (1944).

(1)

The limits of the Court's power to review state enactments in exercise of the police power have amply been defined. It would be supererogation to attempt to define them more cogently than they appear in the majority opinion of the Court of Appeals in this case (1 N. Y., at p. 562).

No one denies the City's power to regulate all persons engaged in the electrical field. The legislative intent is

expressly set forth in B30-2.0 of the Administrative Code itself. Op. Cit., *ante,* p. 4. The manifest evil to which the legislation was addressed was the damage and injuries which can result from the improper handling of electricity (1 N. Y., at p. 568).

The attack, rather, is upon the manner in which the legislature sought to carry out its expressed intent. As to this, the Court of Appeals pointed out that the Administrative Code placed *full responsibility* for adherence to the provisions of the Electrical Code upon *the* master electrician, whether in business for himself, or as the *sole* licensed representative of a partnership or corporation (1 N. Y., at pp. 563-564). It then pointed out that the impact of the supervisory power of the City to revoke or suspend such licenses would be greatly reduced unless licensees were prohibited from engaging principally in some other business (1 N. Y. at pp. 564-565). "It is in this manner," the Court concluded, "that the City Council of the City of New York has seen fit to best protect its inhabitants from the fatal dangers which attend faulty and irresponsible electrical installations, and such cannot be said to be unreasonable" (1 N. Y. at p. 567).

The holding of this Court in *Railway Express* v. *City of New York,* 336 U. S. 106, 109 (1949), conclusively demonstrates the insubstantiality of the federal question raised on this appeal. One need only to substitute the appropriate facts. Thus paraphrased, it may be said that this Court has already decided this case in the following language:

The Court of Appeals "concluded" that being principally engaged in other business dilutes the force of super-

vision via the licensing procedure and "therefore affects the safety of the public" by exposing it to the fatal dangers which attend faulty and irresponsible electrical installations. "We do not sit to weigh evidence on the due process issue in order to determine whether the" statute "is sound or appropriate; nor is it our function to pass judgment on its wisdom. See *Olsen* v. *Nebraska,* 313 U. S. 236. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this" statute "had no relation to the" safety "problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

(2)

The manner in which the appellant has presented questions to this Court (Statement, p. 6) also reveals the insubstantiality of this appeal.

(a)

In the first question presented, two thoughts are expressed. It is first said:

> "The question of most serious public concern presented by this appeal was acknowledged in the dissenting opinion wherein it was noted that many people are compelled to engage in two occupations to earn a living, and the dissenting opinion stated: 'If the order appealed from be upheld, all of such persons may be in jeopardy.'"

The second part of the first question presented is put thus:

> "The decision sought to be reviewed, in effect, deprives a person, concededly qualified by training, experience, and by examination, the right to pursue his vocation, on the sole ground that he is not *exclusively* engaged in the business of a master electrician." (emphasis supplied)

Reference to the dissenting opinion quoted from shows that the persons presumably placed "in jeopardy" by the order appealed from are not *all* persons who hold down two jobs, but only those "in other occupations that are subject to licensing" (1 N. Y. at p. 569). In other words, the question before this Court is *not* whether *all* citizens may constitutionally be restricted to one occupation, nor is it even whether one engaged in a licensed occupation may constitutionally be restricted to that occupation *exclusively*, as the appellant suggests. The question, rather, is whether one engaged in a licensed occupation may constitutionally be required to refrain from engaging principally in some other business. As we have demonstrated, *ante*, pp. 6-8, such a regulation meets the requirements of due process where it is related to a manifest evil and is not unreasonable and arbitrary.

The analogy drawn by the dissenting opinion to a lawyer who might "be disbarred upon the ground that he is also an officer of a corporation to whose business he devotes more than 50% of his business day" (1 N. Y. 2d, at p. 567), and upon which the appellant relies (Statement, p. 7), is logically incomplete. The attacked regulation is founded upon considerations of public safety and grounded in the concern of the legislature to protect the public from the fatal dangers which attend faulty and irresponsible

electrical installations. No one suggests that similar restrictions upon lawyers could *similarly* be justified. In any case, the justification for the attacked regulation is in no way dependent upon its hypothetical extension to other occupations. Each such case, when it becomes justiciable, will have to produce its own justification. Cf. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 424 (1952).

(b)

The appellant presents his second question to this Court in this form:

> "Whether the court below erred in holding that the City of New York may limit one in his choice of a trade, as is accomplished by Section B30-16.0, *when said restriction bears no relation to the public safety.*" (emphasis supplied).

Clearly, the appellant has assumed the converse of that which the Court of Appeals has expressly and affirmatively found. The statute's relation to the public safety was clearly delineated (1 N. Y., at pp. 563-567, 568).

(c)

Truly, the only question properly presented is the appellant's third question:

> "3. Whether that portion of Section B30-16.0 challenged as unconstitutional, is repugnant to Amendment XIV, section 1 of the United States Constitution?"

This question, however, as we have demonstrated (*ante*, pp. 6-8) is too insubstantial to merit this Court's consideration.

CONCLUSION

The appeal to this Court from the judgment entered in the Supreme Court of the State of New York, New York County, pursuant to the remittitur of the Court of Appeals of the State of New York, should be dismissed.

December 10, 1956

Respectfully submitted,

PETER CAMPBELL BROWN
Corporation Counsel of the City of New York
Attorney for Appellees

SEYMOUR B. QUEL
ANTHONY CURRERI
of Counsel

Office - Supreme Court, U.S.
FILED
DEC 28 1956
JOHN T. FEY, Clerk

No. 588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

IN THE MATTER OF THE APPLICATION
of
PAUL SPIELVOGEL,
Petitioner-Appellant,
for an Order

v.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, *et al.*,
Respondents-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, AND THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

HERMAN J. ZAWIN,
Attorney for Appellant,
18 Avenue B,
New York City, New York.

I. STANLEY STEIN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1956

IN THE MATTER OF THE APPLICATION

of

PAUL SPIELVOGEL,

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ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, *et al.*,

Respondents-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, AND THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

The Question Before the Court is Substantial

The sole issue upon which this Appeal is challenged is whether a substantial question is presented which should be determined by this Court.

It appears from the record and the jurisdictional statement that the constitutional question raised at bar is substantial in character and properly raised below warranting review by this Court.

The Entire Electrical Code is Not Challenged

Title B (Electrical Code) of the Administrative Code of the City of New York commences with Section B.30-1.0 and ends with Section B.30-282-0. This code is spread over 235 pages of the Administrative Code (10th Supplement, New York City Charter and Administrative Code, Williams Press edition, pp. 537-772); and only six words of these 235 pages is brought for review to this Court; viz.—"being principally engaged in other business" as set forth in section B.30-16.0 of the Code. The eliding of these words on the grounds that they infringe upon the constitutional rights of the appellant will not in any manner jeopardize the welfare and safety of the people of the City of New York.

No Question of Responsibility is Involved on This Appeal

The appellant, as a master electrician, is charged with the same responsibility imposed upon any other master electrician in New York City, and is under the same supervision and regulation controlling all master electricians.

The argument contained in the majority decision of the New York Court of Appeals that the challenged portion of the statute is necessary to prevent the appellant from "cutting corners" (p. 16—Appendix A) is contrary to the record and the electrical code.

As was observed in the dissenting opinion of the New York Court of Appeals: "No question is involved of appellant's competence to engage in this occupation" (p. 19, Appendix A) and "Appellant's record as master electrician is unblemished since a license was first issued to him in 1928" (p. 21—Appendix A).

Moreover, there can be no "cutting corners"; as is patent from the provisions of Section B.30-18.0 of the

Administrative Code of the City of New York which provides:

> "(b) Before commencing any work, every holder of a license shall file with the commissioner an application for a certificate of inspection of such work. If, after inspection, such wiring or appliances shall be found to have been installed, altered or repaired in conformity with the requirements of this title, the Commissioner shall issue to the applicant a certificate of inspection, temporary or final as the case may be."

It thus becomes manifest from the facts that irrespective of whether you are principally engaged as a master electrician or otherwise, it is necessary to secure a certificate of electrical compliance and there cannot be any "cutting corners." If the work was properly performed a certificate will issue; if not properly performed a certificate will not be issued. Without such certificate being secured a master electrician cannot collect payment for his work. This applies to the appellant as well as all other licensed master electricians.

In the light of this background the words of the dissenting decision are significant:

> "It is more than ever necessary for courts to be on guard to invalidate licensing statutes unless they are actually related to the public safety, health, morals or general welfare." (p. 20, Appendix A)

Respectfully submitted,

HERMAN J. ZAWIN,
Attorney for Petitioner-Appellant,
18 Avenue B,
New York City.

I. STANLEY STEIN,
Of Counsel.

December 27, 1956.

FILED
FEB 6 1957
JOHN T. FEY, Clerk

No. 588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

IN THE MATTER OF THE APPLICATION

of

PAUL SPIELVOGEL,

Petitioner-Appellant,

for an Order

vs.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, et al.,

Respondents-Appellees.

On Appeal From the Supreme Court of the State of New York, New York County, and the Court of Appeals of the State of New York

PETITION FOR REHEARING

HERMAN J. ZAWIN,
18 Avenue B,
New York City, New York,
Attorney for Appellant.

I. STANLEY STEIN,
Of Counsel.

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PAUL SPIELVOGEL,

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Respondents-Appellees.

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellant, pursuant to Rule 58(1) of this Court, petitions for a rehearing of the order entered on January 14, 1957, dismissing the appeal in this case "for want of a substantial federal question."

1. Appellee's motion to dismiss relied on *Day-Brite Lighting Co.* v. *Missouri*, 342 U. S. 421, where this Court upheld a statute much less vulnerable to attack than the one here challenged. It seems therefore particularly ap-

propriate to note here a comment by the *Harvard Law Review* on the *Day-Brite* decision—a comment which is even more relevant to the unwarranted summary disposition of the present appeal:

> "The fear of acting as a 'superlegislature' should not deter the Court from exercising its judicial function, which presumably exists even in the area of economic legislation. When the Court relies on the *West Coast* and *Nebbia* cases to support the State's power to experiment, it should not overlook the fact that these cases also held that due process still requires that a law 'not be unreasonable, arbitrary and capricious and that the means selected * * * have a real and substantial relation to the objects to be obtained.' While the * * * statute might still meet those requirements, it is sufficiently different from past legislative experiments brought before the Court to demand more than summary treatment." 66 *Harv. L. Rev.* 131-132 (1952).

2. Appellant desires to emphasize that this case is here on appeal, not certiorari. It is the first case of its kind brought up for review to this Court.

While this Court may undoubtedly dismiss as insubstantial appeals on wholly frivolous claims, it has not summarily dismissed appeals when the questions raised affect the right to work. In *Barsky* v. *Board of Regents*, 347 U. S. 442, 472, Mr. Justice Douglas called the right to work "the most precious liberty that man possesses."

Professor Walter Gellhorn of the Columbia School of Law, who is known far beyond his profession for his studies in the field of liberty stated in his recent book, "Individual Freedom and Governmental Restraints" in the chapter headed as "The Right to Make A Living" (p. 151):

"* * * As matters stand, the citizen's right to use his faculties in a freely chosen career has been squeezed beyond justification. * * *"

3. The infringements of appellant's right under the 14th Amendment raises an important substantial federal question extending beyond the impact on the appellant alone.

On December 27, 1956, the New York Law Journal, acknowledged as the foremost daily legal publication in the United States, published the decision of the Court below as a matter of *front-page* importance.

On December 31, 1956, Yale University Law School, in a letter to the attorney of Record in this appeal wrote: "We think the above case, in which you were counsel, is one of legal significance, and have thus selected it for argument in the Yale Moot Court of Appeals during the 1957 Spring Term."

In the record itself there is abundant proof that the Court below could not have decided this case, if it were there on any ground other than the infringement of appellant's liberty. For that reason the Court of Appeals certified that solely a constitutional question was involved.

4. To dismiss this appeal without an opportunity for argument—without, even a citation to a prior decision—is to assimilate the appeal jurisdiction of this Court to that of *certiorari*, contrary to the carefully expressed intent of Congress in 28 U.S.C. 1257.

In 28 U.S.C. 1257 at page 203, it is set forth that:

"Where it clearly and unmistakably appears from the opinion of the State Supreme Court that the federal question was assumed to be in issue and was decided against the claim of federal right, and that

the decision of the question was essential to the judgment rendered, this is enough to give the federal Supreme Court authority to examine that question on a writ of error. Montana v. Rice, Mont. 1907, 27 S. Ct. 281, 204 U. S. 291, 51 L. Ed. 490. See also, Chambers v. Baltimore, etc., R. Co., Ohio 1907, 28 S. Ct. 34, 207 U. S. 142, 52 L. Ed. 143."

It appears from the jurisdictional statement of appellant that in the case now before this Court it affirmatively appears from the record that the federal question was presented to the New York Court of Appeals and that its decision of the federal question was necessary to its determination of the cause.

5. Appellant further desires to urge that the present appeal involves more than mere regulation of the economy. The bearing of this statute on liberty and minority rights is manifest; and the restrictive scope of review of legislative acts now applied in typical "economic due process" cases is inappropriate here.

Unlike the usual objector to economic regulation, appellant does not represent a large economic interest fearing merely a diminution of substantial wealth. Rather, deprivation of his license undercuts his basic right of liberty, to follow a calling for which he has duly qualified, and uprightly performed for a period extending over two decades. To this appellant, a disabled war veteran, loss of his license is perhaps a more serious obstacle to fulfilling his individual capacities than any restriction on his right to vote or speak. This challenged statute transcends the area of regulation—it aims to strap the citizen's ambition, even though the record shows it has no clear relation to the public interest. In this setting, the liberty which he is striving to protect should be valued at least as highly as the more usual personal and civil liberties—minority rights claims—to which this Court is justifiably sensitive

in due process cases. Moreover, the dangers inherent in the scheme of restriction challenged provide added reason for careful scrutiny by this Court rather than uncritical reliance on easy labels of "mere economic regulation."

CONCLUSION

For the foregoing reasons, appellant respectfully urges that this petition for rehearing be granted, that probable jurisdiction be noted, and that this case be set down for full argument on the merits.

Respectfully submitted,

HERMAN J. ZAWIN,
Attorney for Appellant,
18 Avenue B,
New York, N. Y.

I. STANLEY STEIN,
Of Counsel.

February 5, 1957

CERTIFICATE OF COUNSEL

WE HEREBY CERTIFY that the foregoing petition for rehearing is submitted in good faith and not for delay.

HERMAN J. ZAWIN

I. STANLEY STEIN

No. 588. SPIELVOGEL *v.* FORD, COMMISSIONER, DEPARTMENT OF WATER SUPPLY, GAS AND ELECTRICITY OF THE CITY OF NEW YORK, ET AL. Appeal from the Supreme Court of New York, New York County. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Herman J. Zawin* and *I. Stanley Stein* for appellant. *Peter Campbell Brown, Seymour B. Quel* and *Anthony Curreri* for appellees. Reported below: See 1 N. Y. 2d 558, 136 N. E. 2d 856.